United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6017 & 76-6024

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant,

FELIX KAUFMAN,
Appellant.

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant,

FREDERIC G. WITHINGTON,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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I N D E X

CITATIONS

Miscellaneous:

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No. 76-6017

UNITED STATES OF AMERICA,
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INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant,

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Defendant,

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Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

ISSUES PRESENTED

1. Whether the denial of a motion to quash a subpoena filed by a non-party witness is appealable as a "final decision" within the meaning of 28 U.S.C. 1291.

2. Whether a non-party expert who possesses highly probative information concerning an important issue in the case and who will be compensated as an expert can be compelled to testify concerning the prior opinions which he rendered as an expert.

OPINIONS BELOW

The opinions of the district court (Kaufman Appendix) 1/ (David N. Edelstein, C. J.) denying appellants' motions to quash were filed on December 4, 1975 and December 8, 1975 and are not reported.

STATEMENT

These consolidated cases are appeals from decisions denying motions to quash subpoenaes directing appellants Dr. Kaufman and Mr. Withington to testify as witnesses for the government in United States v. International Business Machines Corporation, 69 Civ. 200 (S.D.N.Y.). Both Dr. Kaufman and Mr. Withington have also filed petitions for extraordinary writs seeking appellate review of the denial of their motions to quash.

Dr. Kaufman is the National Director of Management Consulting Services for the accounting firm of Coopers & Lybrand. 2/ A

1/ "Kaufman Appendix" refers to "Appendix To Petition For Extraordinary Writ Pursuant to 28 U.S.C. 1651 And F.R. App. P.21 And To Appellant's Brief."

2/ Affidavit of Eugene M. Katz (Katz Affidavit), Kaufman Appendix, p.1.

significant portion of his work during the period to be covered by his expected testimony was in the area of electronic data processing The government contacted Coopers & Lybrand during the spring of 1974 concerning the possibility of obtaining expert testimony on the data processing industry. Coopers & Lybrand initially expressed interest in providing such testimony and identified Dr. Kaufman as the person best qualified to serve as the government's expert witness. 3/ Dr. Kaufman was then interviewed by government counsel and agreed to testify. 4/ However, shortly thereafter, Coopers & Lybrand management advised government counsel that it would not permit Dr. Kaufman to testify on behalf of the government, and his name was removed from the government's witness list. 5/

Mr. Withington is a Senior Staff Member in the Management Services Division of Arthur D. Little, Inc., a management consulting firm. 6/ A significant portion of his work during the period to be covered by his expected testimony was in the area of electronic data processing. In May, 1974, government counsel contacted Mr. Withington, who agreed to testify as a government witness at trial. 7/ However, subsequently, at the request of counsel for Arthur D. Little, Inc., Mr.

3/ Katz Affidavit, Kaufman Appendix, p. 2.
4/ Katz Affidavit, Kaufman Appendix, p. 2.
5/ Katz Affidavit, Kaufman Appendix, p. 3.
6/ Affidavit of Grant G. Moy, Jr. (Moy Affidavit), Appendix To Petition For Extraordinary Writ Pursuant to 28 U.S.C. §1651 And Fed. R. App. P. 21 And to Appellant's Brief (Withington Appendix), p. 1.
7/ Moy Affidavit, Withington Appendix, p. 1.

Withington's name was deleted from the government's witness list. 8/

In January, 1975, after reevaluating the role of Dr. Kaufman's and Mr. Withington's potential testimony in light of the testimony of the remaining government witnesses, the government advised both Coopers & Lybrand and Arthur D. Little, Inc., that Dr. Kaufman and Mr. Withington would be subpoenaed to testify at trial. The district court then granted a government motion to restore Dr. Kaufman's and Mr. Withington's names to the government witness list.

Neither Dr. Kaufman nor Mr. Withington nor their respective employers will be asked to conduct any examinations, experiments or special studies in order to prepare their testimony. 9/ Moreover, they will not be asked at trial for their expert evaluation of the government's evidence. Rather their testimony will be confined to events which occurred between 1960-1972. The government will pay both witnesses as experts for their services. 10/

8/ Moy Affidavit, Withington Appendix, p. 2.

9/ Katz Affidavit, Kaufman Appendix, p. 3; Moy Affidavit, Withington Appendix, p. 2.

10/ The government intends to determine the amount of their fee by negotiations between them and government counsel.

Dr. Kaufman and Mr. Withington moved to quash the subpoenas, arguing, among other things, 11/ that an expert witness may not be compelled to testify except possibly in exceptional circumstances not present in this case. The district court denied the motions to quash (Kaufman Appendix), citing this Court's decision in Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972), certiorari denied, 412 U.S. 929 (1973), where the Court stated that "a court does have the power to subpoena an expert witness and, though it cannot require him to conduct any examinations or experiments to prepare himself for trial, it can require him to state whatever opinions he may have previously formed." 474 F.2d at 536.

11/ Both Dr. Kaufman and Mr. Withington also claimed that their proposed testimony would create a conflict of interest for their employers. The district court rejected this argument because neither proposed witness was directly involved with his employer's work for IBM. In addition, IBM had consented to their appearances as government witnesses. In any event, appellants have not raised this argument in this Court.

ARGUMENT

I. UNDER THE LAW OF THIS CIRCUIT, DENIAL OF A MOTION TO QUASH A SUBPOENA FILED BY A NON-PARTY WITNESS IS NOT APPEALABLE AS A FINAL ORDER UNDER 28 U.S.C. 1291.

This Court under 28 U.S.C. 1[illegible] has jurisdiction only of appeals from "final" decisions of the district courts. It is settled law, in this Circuit, that an order denying a motion to quash a subpoena is not appealable as a final decision. Rather, there is no final order until the district court has adjudged the recalcitrant witness in contempt for refusal to testify. United States v. Fabric Garment Co., 383 F.2d 984 (2d Cir. 1967); United States v. Fried, 386 F.2d 691 (2d Cir. 1967); Bova v. United States, 460 F.2d 404 (2d Cir. 1972).

Appellants' contention that the district court's refusal to quash the subpoenas is appealable under Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), is squarely at odds with this Court's holding in United States v. Fried, supra. 12/ In Fried the Court specifically rejected the argument that an order denying a third party's motion to quash a subpoena is appealable under Cohen, and it stressed the Supreme Court's fidelity, both before and after Cohen, to the holding in Alexander v. United States, 201 U.S. 117 (1906), that an order directing a witness to answer a question is not final

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12/ Appellants' suggestion that Fried was undermined by United States v. International Business Machines Corporation, 471 F.2d 507 (2d Cir. 1972) is untenable in view of the fact that that opinion itself is vacated and of no force. See United States v. International Business Machines Corporation, 480 F.2d 293 (2d Cir. 1973) (en banc), certiorari denied, 416 U.S. 979 (1974).

until his refusal produces a judgment of contempt. Fried, supra, at 694. The Supreme Court has subsequently reaffirmed this position. United States v. Ryan, 402 U.S. 530 (1971); see also Bova v. United States, supra. 13/ See further Ryan v. Commissioner of Internal Revenue, 517 F.2d 13, 17-20 (7th Cir. 1975), certiorari denied, 44 U.S.L.W. 3228 (1975); Gialde v. Time, Inc., 480 F.2d 1295, 1301 (8th Cir. 1973); United States v. Anderson, 464 F.2d 1390, 1391-1392 (D.C. Cir. 1972); Borden Company v. Sylk, 410 F.2d 843, 845-846 (3rd Cir. 1969).

Dr. Kaufman and Mr. Withington, of course, do have an appropriate means to obtain "precompliance appellate review" of the validity of the subpoenas. Their proper course is "to resist and risk a contempt citation" (Maness v. Meyers, 419 U.S. 449, 463 (1975)) and appeal that contempt to this Court. See United States v. Fried, supra, 386 F.2d at 695. 14/ But because the public has a right to everyman's evidence (e.g., United States v. Nixon, 418

13/ Appellants' contention that United States v. Ryan and Bova v. United States, supra, are distinguishable because they are criminal cases is unsound, for the doctrine they follow has its roots in Alexander v. United States, supra, a civil antitrust case. Appellants' proposed distinction has also been rejected by commentators and courts: see Wright & Miller, Federal Practice and Procedure: Civil §2463, p. 452 (1971); Childs v. Kaplan, 467 F.2d 628 (8th Cir. 1972).

14/ Civil contempts against non-parties and all criminal contempts are immediately appealable. See International Business Machines Corp. v. United States, 493 F.2d 112, 115 n.1 (2d Cir. 1973), certiorari denied, 416 U.S. 995 (1974); Bessette v. W.B. Conkey Co., 194 U.S. 324 (1904).

U.S. 683, 709 (1974)), "this is no time to weaken the historic rule putting a witness' sincerity to the test of having to risk a contempt citation as a condition to appeal, however harsh its application may seem to the appellant here." United States v. Fried, supra, 386 F.2d at 695.15/ Thus, under the settled law of this Court, these appeals should be dismissed.

15/ It may be that in certain exceptional cases involving important governmental privileges that the denial of a motion to quash a subpoena is directly appealable. See United States v. Nixon, 418 U.S. U.S. 683, 690-692 (1974). However, this case does not fall within this very limited exception to the finality requirement of 28 U.S.C. §1291.

II. THE DISTRICT COURT PROPERLY REFUSED TO QUASH THE SUBPOENAES.

Appellants contend that a district court lacks the power to compel a witness to testify against his will as an expert. This argument is irrelevant to some of the testimony the government plans to draw from appellants, does not accurately reflect the general law governing expert testimony, and is inconsistent with the law of this Court.

1. Some of the testimony which the government plans to elicit from appellants is not expert testimony at all because it does not probe their expertise but simply calls on them to recall prior events.

The government has alleged that IBM monopolized the market for general purpose digital computer systems in violation of Section 2 of the Sherman Act. Hence, testimony establishing the choices of electronic data products which were available to users and potential users of computer systems during the period 1960-1972 is extremely important to any analysis of the relevant product market in this case.

The United States has subpoenaed Dr. Kaufman and Mr. Withington because of their extensive experience conferring with users and potential users of computer systems. We intend to ask appellants to describe the training and experience which qualified them to render expert advice on computer systems to potential users during 1960-1972, to explain the nature of their duties as computer systems consultants, and especially to recount the advice which they gave to various users and potential users of computer systems.

This essentially factual information will be doubly useful to the district court. First, it will aid the court in defining the relevant product market. Second, it will prevent the needless prolongation of what is already one if the longest trials in history, for, in the absence of appellants' testimony, the government would be obliged to call large numbers of computer users to provide substantially the same information.

In so assisting the district court, appellants will be asked to give testimony no different from that of ordinary witnesses who are simply asked to testify concerning their recollection of past events. Since they will testify as ordinary witnesses, there is no reason to treat them in this regard any differently than ordinary witnesses. And, even assuming, as appellants contend, that some special standard should be applied in determining whether a witness can be compelled to testify as an expert, that standard should not apply to this essentially factual testimony.

2. The district court has the authority to require a witness to testify as an expert.

The government, in order to provide the court with a complete understanding of how users and potential users viewed the market from 1960-1972, will ask Dr. Kaufman and Mr. Withington to explain the reasons for the recommendations they made to their customers in those

years. The district court found that this expert testimony, which will not require the defendants to perform any experiments or special examinations in preparation for their testimony, "has promise to be highly productive and of assistance to the Court in the trial of this case." Kaufman Opinion, p. 7. The government will pay appellants as experts.

Appellants do not dispute that their testimony is likely to be highly valuable to the court, but they contend that even if this is so they have the right to withhold it from the court. Although appellants mingle their arguments, they appear to advance two contentions: a) a court is totally without power to compel an expert to testify; b) a court is without power to compel an expert to testify unless no other comparably qualified expert is available. The arguments are erroneous.

a. It is axiomatic that the public is entitled to every man's evidence. United States v. Nixon, supra, 418 U.S. at 709. The evidence of an expert is no less evidence than that of any other person. 8 Wigmore, Evidence, 2203(2)(c) (3rd ed. 1961. Yet appellants urge this Court to grant to experts a sweeping immunity from being compelled to testify, which in its comprehensiveness would rival the constitutional privilege against self-incrimination. 16/ There is no good reason why the legal system should place this

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16/ Under appellants' proposal, experts as a class could not be compelled even to take the witness stand, a privilege heretofore enjoyed only by defendants in criminal cases.

class of persons beyond its power to compel testimony, especially where, as appellants note (App. Br., 10), the testimony of experts is important to the just disposition of numerous cases both criminal and civil. 17/

The authority of the district court to compel an expert witness to testify accordingly is clear. This Court has held that "a court does have the power to subpoena an expert witness and, though it cannot require him to conduct any examinations or experiments to prepare himself for trial, it can require him to state whatever opinions he may have previously formed." Carter-Wallace v. Otte, 474 F. 2d 529, 536 (2d Cir. 1972), certiorari denied, 412 U.S. 929 (1973). 18/ Not only is this the law in this Circuit, but appellants cite no modern federal authority to the contrary. Since appellants' claim for absolute testimonial immunity for expert witnesses both saps the vital principle that the law is entitled to everyman's evidence and is flatly contrary to the law of this Court, it should

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17/ It does not advance appellants' argument to asset that experts have a "proprietary asset" in their expertise which they are free to use as they see fit (App. Br., 12). This is only to state a conclusion, for "proprietary assets" are meaningful only to the extent the law recognizes them.

18/ Although appellants characterize this statement as "dictum" (App. Br., 8) this surely mislabels it, for the express rejection of one of the principal arguments made by counsel - that no expert witness can ever be compelled to testify - can not be dismissed as mere dictum.

be rejected.

b. Appellants' alternative argument that a court may not compel a witness to testify as an expert unless no other comparably qualified expert is available (App. Br., 11) is also unsound. As Professor Moore has noted, "[t]he general American rule is that in the absence of statute an expert stands on the same footing as any other witness and may be compelled to testify without the payment of special compensation, even though his knowledge of the facts may have been acquired through scientific study and professional practice." 4 Moore's Federal Practice ¶26.66[1], at p. 26-469 (1972). Thus a witness who is compelled to testify as an expert has no greater rights than any ordinary witness. 8 Wigmore, Evidence §2203(2), pp. 137-143 (3rd ed. 1961).

The general rule explained above is completely consistent with the Court's decision in Carter-Wallace v. Otte, supra. In that case, Carter-Wallace appealed a judgment of patent invalidity and argued that the use of prior expert testimony given in a Court of Claims action also involving Carter-Wallace as plaintiff was improper. It argued that, although the experts were unavailable because they were outside the reach of the district court's subpoena power (see Rule 45(e), F.R. Civ. P.), the normal rule of unavailability did not "apply 'to expert witnesses whose opinions could under no circumstances be obtained through court process.'" Carter-Wallace,

supra, 474 F. 2d at 536. Judge Friendly for the Court rejected this argument, and citing the passages from Moore and Wigmore mentioned above, held that "a court does have the power to subpoena an expert witness and *** it can require him to state whatever opinions he may have previously formed." Id. at 536.

Appellants' contention that the decision in Carter-Wallace supports their claim of an immunity from testimony (App. Br., 8-11) misconceives that opinion. The Court did speak of the need to show that another comparable expert witness is not available, but it did so only as a precondition to the use of "the former testimony of an expert witness". Carter-Wallace, supra, 474 F. 2d at 536. The Court's concern, as the opinion makes plain, is that "the general preference of the federal rules * * * is for oral testimony, so that there will be an opportunity for live cross-examination and observation of the demeanor of the witness." Id. at 536. Thus, where prior testimony is proposed to be introduced, there is a need to balance one party's need for the testimony against the deprivation of the other party's right of cross-examination. Appellants, of course, will be available for cross-examination and for observation of demeanor, and unlike Carter-Wallace, there is therefore no need for the government to establish the necessity of their testimony.

Appellants' further argument that under Carter-Wallace one expert is the same as another (App. Br., 11), is not correct. Experts and their testimony are not inevitably the same, as attested by the numerous cases where well qualified experts express varying views, just as ordinary witnesses often do. For ultimately, what a court wants of an expert is what it wants of any ordinary witness: "He is asked merely, as other witnesses are, to testify what he knows or believes." 8 Wigmore, Evidence, §2203(2)(c), p. 137 (3d ed. 1961). The Court in Carter-Wallace, supra, 474 F.2d at 536, expressly cited this subsection of Wigmore. It may be that in certain instances the paramount interests of the Court, e.g., in having cross-examination and demeanor evidence, may warrant a certain insensitivity to the differences in expert witnesses. Id. at 536-537.19/ But the Court's need to protect its litigants' rights is hardly of the same order as the convenience of particular witnesses, especially those who are the choice of the litigants and who will be well paid for their testimony.

19/ The testimony of ordinary witnesses to the same events, of course, often turns out to be substantially identical.

CONCLUSION

For the foregoing reasons, the appeals should be dismissed. Alternatively, the order of the district court should be affirmed.

Respectfully submitted.

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March, 1976.

CERTIFICATE OF SERVICE

I, John J. Powers, III, hereby certify that I have on this 5th day of March, 1976, caused to be served a copy of the BRIEF FOR THE UNITED STATES OF AMERICA upon the following persons:

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